UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

Plaintiff(s),

vs.

KENNETH MELLERT

Defendant(s).

_____/

No. CR 03-0043 MHP

MEMORANDUM

(Statement of Reasons)

In 1984 Congress established the United States Sentencing Commission "as an independent commission in the judicial branch of the United States" to set "sentencing policies and practices for the Federal criminal justice system." 28 U.S.C. §991. Among the considerations spelled out in the statutory enactment are the "nature and circumstances of the offense and the history and characteristics of the defendant" including the seriousness of the offense, just punishment, adequate deterrence, protection of the public from further crimes of the defendant and the need to provide the defendant with educational or vocational training or other effective correctional treatment. 18 U.S.C. §3553(a). The Commission is directed to adopt such guidelines as would avoid "unwarranted sentencing disparities" among defendants with similar records, convicted of similar crimes "while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. §991(b).

While many federal judges have chafed at the notions behind and the strictures of the guidelines, they try mightily to comply with them and to assure that the sentences they impose comport with the principles guaranteed by the United States Constitution.

The Sentencing Commission, pursuant to its statutory mandate, regularly reviews the guidelines, the data and material submitted by the District Courts, and other information it gleans from its research, hearings and advisory groups. This last category represents a broad group of professionals and practitioners with extraordinarily varied experiences within the criminal justice system.[1] One would be hard-pressed to find a greater wealth of wisdom and experience that could be brought to bear upon the issues related to sentencing.

Nonetheless, some who are less dispassionate, far less experienced, and imbued with a sense of mission have set about to change the guidelines directly, not through the thoughtful and careful deliberative process informing the adoption of the Sentencing Guidelines by the Sentencing Commission. For example, the Protect Act, Pub.L. No. 108-21, 117 Stat. 650 (2003), was amended after twenty minutes of discussion on the floor of the House of Representatives. The amendments added not only statutory provisions for mandatory minimums with respect to certain crimes, but also actually added or amended the guidelines themselves. Before this Congressional tinkering with the actual guidelines, the Commission, pursuant to its mandate, thoroughly reviewed the data and research it had accumulated, consulted with the advisory groups, solicited comment and, then, amended, added or deleted guidelines providing reasons, commentary and explanations for the changes.

The Protect Act represents a significant departure from this dispassionate, deliberative process. It appears that it is the harbinger of future legislation. For example, a proposed bill entitled the "VICTORY Act", appears to be lurking in the halls of Congress.[2] This piece of legislation would add not only more mandatory minimums, but also insinuate Congress even further into the process of actually drafting and promulgating Sentencing Guidelines, thus taking over the role of the Sentencing Commission as well as the judiciary's traditional role of sentencing. Indeed, section 401(n) of the Protect Act amends 28 U.S.C. section 991(a) changing the composition of the Sentencing Commission to delete the requirement that "at least three" of the members of the Commission be "Federal judges" to "not more than three", further diluting the judiciary's input and decision making with respect to the guidelines.

It appears that much of Congress' effort is prompted and advised by the Department of Justice or persons within that Department without the benefit of the accumulated wisdom of the Sentencing Commission or the Judiciary. The thrust of the legislation is to remove more and more of the determination and discretion in sentencing from an independent judiciary and the Commission and vest it in the Department of Justice, which, of course, is a partisan in our system of justice.

Under this new regime not only will the government determine the charges to be filed, whether the indictments will undercharge or overcharge the criminal conduct, or, whether it will engage in pre-indictment or post-indictment maneuvering to bring about the government's desired result, but it also will be the only voice heard when adopting statutory sentences and Sentencing Guidelines with less and less discretion afforded to the courts and the Sentencing Commission. To put it more bluntly, the wisdom of the years and breadth of experience accumulated by judges and the Sentencing Commission in adjudicating criminal cases and sentencing defendants is shucked for the inexperience of young prosecutors and the equally young think-tank policy makers in the legislative and executive branches.

As noted by Judge Guido Calabresi, a judge of the United States Court of Appeals for the Second Circuit Court and a law professor and former law school dean, "[A]n independent judiciary which applies rules of law...is a pain in the neck to any government that wants to get things done."[3]

The judicial branch should not be timid nor fearful of inflicting an occasional whiplash or, where necessary, even imposing chronic pain when Constitutional rights are threatened or the balance of powers is jeopardized.

In its consequences the present case presents little more than a slight twinge, yet it is symptomatic of the problem. The government drove a bargain that allows the defendant to plead guilty to an offense that carries a guideline range of ten to sixteen months with a condition that defendant may move for a downward departure of not more than two levels. In addition, the government agrees that it will be bound by a very specific sentence of not less than two months imprisonment and four months home detention, among other provisions. The agreement, however, does not bar the government from arguing against the downward departure or arguing in favor of a sentence at the upper end of the guideline range. Nevertheless, the government will not contest a downward departure unless it is lower or different than the two months imprisonment.[3]

By this sleight-of-hand, the government does not have to justify a downward departure or appear to have stipulated to one even though it will settle for a sentence that would require a downward departure.[4] Indeed, it is clear from the Agreement and the customary practice in this District that the government is supporting or condoning a downward departure without appearing to agree to one. And, of course, if the government is unhappy with the sentence it can blame the court. The court is left in the untenable position of having to sentence the defendant to a sentence the government concedes is appropriate, but for which it will offer no reasons in support. The government also has the advantage of arguing against the "acceptable" sentence, thus appearing to take a hard line.[5]

The court is neither so reticent nor so calculating as to indulge this practice. Hence, the sentence the court imposes reflects the basis for granting the downward departure that the government accedes to, but is unwilling to support. The sentence also reflects the wisdom of an experienced probation officer and the judgment of a judge with more than twenty-five years on the bench. While prosecuting, arguing for or negotiating a plea agreement is the responsibility of the Department of Justice through its United States Attorneys, it is the responsibility of the Court to do justice.

Defendant does move for a downward departure as permitted by the plea agreement. He argues that his conduct amounts to aberrant behavior and that a departure should be granted pursuant to §5K2.20 of the Sentencing Guidelines which recognizes this as a ground for a downward departure. In order to justify such a departure the court must find the case "extraordinary" and further find the defendant's conduct meets the three requirements for "aberrant behavior". United States v. Guerrero, 333 F.3d 1078, 1081 (9th Cir.2003); U.S.S.G. §5K2.20. The term "extraordinary" is not defined in the guidelines. Some Circuits have referred to the dictionary or common meaning of the term, leaving it to the sentencing court's sound discretion whether the case before it is an extraordinary case. See, e.g., United States v. Castano-Vasquez, 266 F.3d 228, 233 (3d Cir.2001)(cited approvingly in this Circuit's Guerrero case, 333 F.3d at 1081). The Castano-Vasquez court noted that it was appropriate in determining the "extraordinary" question to look to the five factors in Application Note 2 of the Commentary to §5K2.20, but that these factors are not exclusive nor mandatory. 266 F.3d at 233-36.

The five factors in Note 2 are the defendant's "(A) mental and emotional conditions; (B) employment record; C) record of prior good works; (D) motivation for committing the offense; and (E)

efforts to mitigate the effects of the offense." With respect to three of these considerations the defendant presents stellar qualifications. He has an outstanding employment record and even though this particular offense took advantage of a downturn in his employer's sales he had always put his employer first, being a good mentor and role model to other employees. He had always been an exemplary employee. His record of prior good works is attested to by numerous letters from people with whom he has worked or engaged in community service. He also mitigated the effects of his conduct by depositing the profits of his ill-gotten gain rather than spending or hiding them. The Presentence Report ("PSR") states that defendant acknowledged that because of his sense of guilt for what he had done he did not spend the money. The money was subsequently transferred to his attorney's trust account where it could be held for forfeiture or restitution. There are no mental or emotional conditions that are compelling. The motivation appears to be to profit from information defendant acquired as a result of his position with the company. However, it is not a case of unmitigated greed that so frequently attends these cases.

In addition to these factors, the court notes that this is one of the least pernicious insider trading cases to come before it. Although the government explained at sentencing that it would view his pre-transaction conduct as described in paragraph 4 of the PSR as part of the insider trading scheme, the court finds that even examining it in the light most favorable to the government, it does not amount to insider trading.

This leads to the discussion of the three elements of "aberrant behavior" which must be looked at and established separate and apart from whether the case is an "extraordinary" one.

The transaction in this case is a single occurrence. The discussions leading up to it did not involve criminal conduct or any significant planning. The offense itself involved one phone call resulting in one transaction. That transaction was of limited duration, a purchase of 500 puts and a sale two to three days later. This conduct represents a marked deviation from what has been not just a law-abiding life, but an exemplary one.

The court finds based on the foregoing that this case is an extraordinary one and that defendant's conduct meets the requirements of the policy statement on aberrant behavior. The court further finds that despite the government's protestations to the contrary, by virtue of the plea agreement it essentially has conceded that a downward departure on these grounds is justified.

Therefore, the motion for a downward departure of two levels is granted and the sentence will be calculated at an offense level 10 which yields a guideline range of 6 to 12 months. The court further finds that, as conceded by the government in its acceptance of a minimum sentence of two months, a sentence at the low end of the guideline range of a two-level downward departure is appropriate. In view of the circumstances that make this case extraordinary, and defendant's behavior aberrant, the court finds that two months community confinement satisfies the need for deterrence to the defendant and to the community.

A cost/benefit analysis of placing defendant in an actual prison type facility rather than a community corrections facility does not bear up, given the conduct involved, the amount of money involved, and the other losses defendant has suffered. He has lost his job. Because of the publicity which was disproportionately high given his job and the offense, he has suffered a disproportionate amount of humiliation and found it difficult to find another job. Now that he has finally secured a position, it is more important that he pay the fine, restitution and whatever Security and Exchange Commission ("SEC") sanctions may result from the SEC's civil action.

Furthermore, defendant is not one who has flagrantly and blatantly defrauded his company in the manner of the recent wave of white-collar defendants. Having the door shut at the community corrections facility for a couple of months is as serious as having the gate shut at one of the Bureau of Prison camp-type facilities and, together with the remainder of the conditions of the sentence imposed and all of the post-offense consequences, the dual purposes of individual and societal deterrence are satisfied.

The above together with the statements in the court's bench order at the time of sentencing constitutes the state of reasons for this sentence.

IT IS SO ORDERED.

Date: July 30, 2003

_____/s/_____
MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

ENDNOTES

1. Among the advisors are the Ad Hoc Advisory Group on Organizational Guidelines, consisting of a number of partners of major law firms, law professors, a United States attorney, presidents and CEOs of businesses and non-profits; a United States Probation Officer Advisory Group, made up of fifteen senior probation officers from around the country; a Practitioners Advisory Group, composed of fifty attorneys with wide varieties of experience and from all parts of the United States. In addition, the Sentencing Commission maintains contact with the National Association of State Sentencing Commissions which has members of the state sentencing commissions.

2. See Hon. Diana E. Murphy, *Message from the Chair*, Guidelines: News from the U.S. Sentencing Commission, July 2003, at 2.

3. Hon. Guido Calabresi, *The Current, Subtle- and Not So Subtle - Rejection of an Independent Judiciary*, 4 U. Pa. J. Const. L. 637 (2002).

4. The plea agreement provides in pertinent part:

> "I agree that the government may withdraw from this agreement if the Court imposes a sentence that is lower in any respect than the minimum sentence set forth in paragraph 8, below."

It further provides that:

> "I agree that an appropriate minimum sentence is as follows: 2 months imprisonment, 4 months home detention, 3 years supervised release....I reserve my right to move for a downward departure of no more than two levels, from offense level 12 to offense level 10."

The agreement is signed by the defendant, attorney and the attorney for the government.

5. Under the Protect Act both the Department of Justice and the Court must specifically report downward departures. It was downward departures that appeared to stir the wrath of Congress. That wrath was particularly focused on the judiciary even though most downward departures are negotiated by, stipulated to or unchallenged by the government.